ROBERT S. GLENN
DeLOYD CAZIER

IBLA 92-255, 92-261 Decided September 17, 1992

Appeals from decisions of the Idaho State Office, Bureau of Land Management, declaring certain mining claims null and void ab initio. IMC 119429-119435 et al.

Affirmed.

1. Act of March 20, 1911--Administrative Authority: Generally--Exchanges of Land: Generally--Exchanges of Land: Forest Exchanges

   Lands conveyed to the United States under 16 U.S.C. § 485 (1988) become, upon acceptance of title, a part of the national forest within whose external boundaries they are located. The Office of the General Counsel for the U.S. Department of Agriculture has stated that acceptance of title is not final until the final title opinion is issued by that office. It is therefore the date on which the Office of the General Counsel accepts title that determines when exchanged land is subject to location of mining claims.

2. Administrative Procedure: Administrative Procedure Act--Regulations: Force and Effect as Law

   An agency may establish a rule of law by adjudication. If such a rule has not been established by adjudication, then, in order for it to have the force and effect of law and be binding on the agency as well as the public, it must be a substantive rule affecting individual rights and obligations that has been issued by the agency pursuant to statutory authority and promulgated in accordance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), or other procedural requirements imposed with Congress.

   Robert N. Shanahan, 120 IBLA 187 (1991), modified to the extent inconsistent.

APPEARANCES: Robert S. Glenn and DeLoyd Cazier, Boise, Idaho, pro sese.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Robert S. Glenn and DeLoyd Cazier have appealed the February 10, 1992, decisions of the Idaho State Office, Bureau of Land Management (BLM), declaring several of their mining claims null and void ab initio. 1/ The reason for the decisions was that the lands were not open to mineral entry when the claims were located on February 5, 1987, because title to the land was not accepted by the Office of the General Counsel (OGC), U.S. Department of Agriculture, until April 17, 1987. 2/

The location of these mining claims was closely related to a 1987 land exchange pursuant to 16 U.S.C. § 485 (1988) and 43 U.S.C. § 1716 (1988) between the State of Idaho and the U.S. Forest Service (FS). Before the exchange the lands were owned by the State, having been patented by the United States to the State without a mineral reservation. Appellants conducted mining activities pursuant to State mining law when the land was owned by the State, and they intended to establish mining claims on the same lands under Federal law after the exchange.

State of Idaho deed No. 12258 reconveying the land to the United States was signed by the Governor, the Secretary of State, and the Director of the Department of Lands of the State of Idaho on February 5, 1987. The deed was recorded by the Boise County recorder at 3:35 p.m. on that day. The notices of location for Cazier and Glenn were recorded at 4 p.m. on the same day by Don Fuller, an FS employee.

Lands conveyed to the United States pursuant to 16 U.S.C. § 485 (1988) shall, upon acceptance of title, become part of the national forest within whose boundaries they are located. These lands are within the borders of the Boise National Forest. Based on an April 28, 1987, letter from the Director, Recreation and Lands, Intermountain Region, FS, to the State Director, Idaho State Office, BLM, stating "[t]itle was accepted by General Counsel on April 17, 1987," BLM issued its initial decisions declaring these mining claims null and void ab initio on February 2, 1989. We considered Glenn and Cazier's appeals from these decisions in Robert N. Shanahan, supra note 2. We stated that

> [a] review of Department of Agriculture regulations, the FS Manual (FSM), and the FS Land Acquisition Handbook (Handbook) * * * makes it appear that authority to accept title pursuant to 16 U.S.C. § 485 (1988) and 43 U.S.C. § 1716 (1988) has been

1/ The Cazier claims declared null and void ab initio are I MC 119436 to I MC 119438, I MC 119443, I MC 119447, and I MC 119448; Glenn's claims are I MC 119429 and I MC 119431 to I MC 119435.
2/ The BLM decisions were made as a result of our decision in Robert N. Shanahan, 120 IBLA 187 (1991), discussed below. We have therefore consolidated and expedited these appeals for decision.

> delegated by the Chief of the Forest Service to the Regional Forester, rather than to OGC.

Id. at 188. We referred to the various delegations of authority and procedures for FS land exchanges contained in these documents and noted that both FSM Chapter 5404.14(16) and FS Handbook Chapter 32.18 state the Regional Forester accepts title to non-Federal lands. Id. at 189. We concluded: "If, as these sources indicate, OGC approval of title is to be followed by Regional Forester or Forest Supervisor acceptance of it, the record does not indicate when the OGC approved the title and when the Regional Forester or Forest Supervisor accepted it." Id. at 192. We set aside BLM's decisions and remanded the cases "so that it may investigate exactly what actions were taken by which FS personnel and when." Id.

On September 5, 1991, BLM requested FS to provide it with the information necessary to resolve the questions raised by the Board. On October 28, 1991, the Director, Recreation and Lands, Intermountain Region, FS, responded. He enclosed a memorandum dated October 21, 1991, from the OGC and stated: "As pointed out in the [October 21] opinion, final acceptance is effective on the date of the OGC's Final Title Opinion, which was issued on April 17, 1987." 3/ BLM requested the FS Regional Forester to sign this response. 4/ The Regional Forester checked with OGC and confirmed this information in a letter to BLM dated January 27, 1992. Referring to BLM's initial decisions, the Regional Forester stated:

> Subsequently, the BLM determined that the Forest Service could not have accepted title to the lands when the deeds were recorded since Federal Law and the Department of Justice guidelines for the acceptance of title to real property by Federal agencies require that a Final Title Opinion be obtained prior to acceptance of title. Since title had not been formally

---

3/ The October 21 memorandum is entitled "Acceptance of Title in Forest Service Exchanges, Robert N. Shanahan et al., 120 IBLA 187 (1991)," and was prepared by Kenneth D. Paur, an attorney in OGC's Ogden, Utah, office. BLM sent appellants the FS letter and memorandum on Nov. 6, 1991, stating: "We will reissue our decision in the near future pursuant to the IBLA's remand in Robert N. Shanahan, et al, supra. However, we are sending copies of the above-mentioned Forest Service letter and opinion with this letter to give you as much advance notice as possible."

4/ BLM's Nov. 21, 1991, letter to the Regional Forester stated:

"Any date for acceptance of title that is subsequent to February 5, 1987, when the claims were located * * * would cause the claims to be void and deprive the claimants of the rights the Forest Service apparently intended to convey. Therefore, it is crucial that the Regional Forester, who clearly has the authority to establish the date of title acceptance, sign the letter rather than the Director of Recreation and Lands."

> accepted by the Forest Service until issuance of a Final Title Opinion on April 17, 1987, the land was not open to entry under the Federal Mining Laws until April 17, 1987, and the claims
> filed on February 5 were therefore determined to be null and void.

* * * * * * *

> In response to a remand from IBLA, BLM sent inquiry to the Forest Service to determine the date of final title acceptance. The Forest Service confirmed that its acceptance of title was effective on the date of the Final Title Opinion, April 17, 1987.
>
> Therefore, any claims filed prior to April 17, 1987, are deemed to be null and void. [5/]

Based on the information received from FS, BLM found that title was not accepted until April 17, 1987, and declared the claims null and void
ab initio in its February 10, 1992, decisions.

Glenn and Cazier appealed BLM's decisions. In their statements
of reasons they essentially set forth an estoppel argument against FS. Cazier points to a December 23, 1981, letter from the Recreation, Lands
and Mineral Officer, Boise National Forest, FS, in which he states:

> We favor protecting your existing rights. To do this, we need to hold your application for mineral lease in our office pending consummation of the exchange. On the day of closing,
> we would concurrently file our deed from the State, your lease application, and our recommendation that the lease be issued with the Bureau of Land Management.

Cazier states that Don Fuller of FS filed his notices of location with the Boise County Recorder's office as soon as the deed was signed and accepted by FS on February 5, 1987, and subsequently made the proper filings with BLM. Glenn indicates that he had similar dealings with Fuller.

[1] In its memorandum dated October 21, 1991, OGC, speaking of the Board's decision in Robert N. Shanahan, supra, stated:

> What IBLA failed to discuss was the practice of the Forest Service in using preliminary title opinions from OGC as a basis for closing real estate transactions. This mechanism is utilized to allow simultaneous exchange of consideration at closing, even though a subsequent final title opinion is still required by the

---

5/ The Regional Forester's letter concluded: "Currently, the third party which filed his mining claim after April 17, 1987, has the priority interest in the mineral estate. This claim covers most, but not all, of the area originally held under State lease."

Justice Department guidelines for accepting title to lands on behalf of the United States.

> The preliminary title opinion is the primary mechanism fulfilling the statutory requirement that the Department of Justice, or its delegee, approve title to lands prior to payment of consideration by an agency of the federal government.
> On the basis of the preliminary opinion, the final requirements for closing are identified by OGC and fulfilled by the Forest Service, the closing takes place, and consideration exchanged.
>
> Since the consideration is relinquished by the Forest Service at the time of closing, and there is no authority for any officer of the federal government to release the consideration in a land exchange until something of value is acquired in return, the act of relinquishing title to federal land (or releasing federal dollars in a direct purchase) is a defacto acceptance of title. However, Forest Service and Justice Department guidelines do not allow that acceptance to be final until such time as the final title opinion is issued by OGC. Effectively, there is a conditional acceptance of title by the Forest Service at the time of closing, manifested by its release of consideration, that only becomes a final acceptance when the contingency has been met. That contingency is the issuance [of] a final title opinion from OGC approving title. Therefore, there is no further action required by the Forest Service to accept title after the issuance of the final opinion by OGC. Since approval of title by OGC is an element of acceptance, acceptance cannot relate back to the closing but is effective on the date of OGC title approval.
>
> Though the above analysis is somewhat strained, it is consistent with past practices of the Agriculture Department insofar as the apportionment of lease royalties on acquired lands. 2/ Furthermore, given the rather awkward nature of federal land transactions generally under the DOJ [Department of Justice] guidelines, there is an inherent difficulty in determining the precise point when a given action is effective.
>
> * * * * *
>
> 2/ See: In Direct Purchase Cases, When Does Title Vest in the United States for all Purposes, Opinion of the Attorney in Charge, OGC Milwaukee (December 23, 1977). [Emphasis in original.]

(OGC Oct. 21, 1991, memorandum at 2-3).

[2] In the Department of the Interior there is a rule of law, established by our decisions on behalf of the Secretary under 43 CFR 4.1, that agency employees are bound to follow agency manuals. For example, we have said:

> We recognize that the BLM Manual, like BLM Instruction Memoranda, is not promulgated with the procedural protections provided for regulations and therefore does not have full force and effect of law. United States v. Kaycee Bentonite, 64 IBLA 183, 214 [89 I.D. 262, 279] (1982); see Schweiker v. Hansen, 450 U.S. 785, 789 (1981). Nevertheless, BLM employees are obliged to follow the terms and instructions of its manual.

Beard Oil Co., 105 IBLA 285, 288 (1988). Further, "Instruction Memoranda and BLM Manual provisions do not have the force and effect of law and are not binding on either this Board or the public at large." Pamela S. Crocker-Davis, 94 IBLA 328, 332 (1986).

So far as we have been able to learn, the U.S. Department of Agriculture has not established a similar rule by adjudication that would require FS personnel to follow the procedures in the FSM and the Handbook. If such a rule has not been established by adjudication then, in order for these procedures to have the force and effect of law and be binding on the Department as well as the public, they must be substantive rules affecting individual rights and obligations that have been issued by the agency pursuant to statutory authority and promulgated in accordance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), or other procedural requirements imposed by Congress. Chrysler Corp. v. Brown, 441 U.S. 281, 301-303 (1979); United States v. Harvey, 659 F.2d 62, 64 (5th Cir. 1981); Lumber, Prod. & Indus. Workers Log Scalers v. United States, 580 F. Supp. 279, 282-84 (D. Ore. 1984); Shell Offshore, Inc., 96 IBLA 149, 170-72, 94 I.D. 69, 81-82 (1987). Although FS regulation 36 CFR 254.4 states that specific details for exchanges are contained in Title 5400 of the FSM, these specific procedures have not been promulgated in accordance with 5 U.S.C. § 553 or incorporated by reference in accordance with 1 CFR Part 51. Therefore, under the practice set forth in the OGC memorandum, final acceptance of title took place on April 17, 1987. Prior to the acceptance of title, the lands were not owned by the United States. See Junior L. Dennis, 40 IBLA 12 (1979). Therefore, the claims are indeed null and void ab initio.

We note that the procedure for acceptance of title as set forth in the OGC memorandum is now embodied in a proposed FS regulation, 36 FR 254.16(b), published in the Federal Register on October 2, 1991 (56 FR 49961).

We express no opinion on whether appellants may have an estoppel or other claim against FS. 6/ Based on the information in the case file, BLM made the correct decision. Under the circumstances, we cannot help appellants.

---

6/ The elements of estoppel are set forth in United States v. Georgia-Pacific Company, 421 F.2d 92 (9th Cir. 1970).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Will A. Irwin
Administrative Judge

I concur:

Bruce R. Harris
Deputy Chief Administrative Judge